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# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 1060

EDWARD J. WETZEL,
*Appellant,*

vs.

THE STATE OF OHIO,
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF OHIO.

## MOTION TO SUBSTITUTE A PARTY
## and
## JURISDICTIONAL STATEMENT.

JACK G. DAY,
1748 Standard Building,
Cleveland, Ohio,

FRANCIS M. MARLEY,
Room 4, Rosendale Building,
Fostoria, Ohio,
*Attorneys for Appellant.*

FORREST H. BACON,
*Prosecuting Attorney,*
Wyandot County, Ohio,
104 E. Wyandot Avenue,
Upper Sandusky, Ohio.

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# In the Supreme Court of the United States

OCTOBER TERM, 1961.

No.

EDWARD J. WETZEL,

*Appellant,*

vs.

THE STATE OF OHIO,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF OHIO.

## MOTION TO SUBSTITUTE A PARTY.

Counsel for the Appellant respectfully advise the Court that Edward J. Wetzel died on April 26, 1962, after filing of the notice of appeal in this cause. Accordingly, Counsel move that Margie Wetzel, Administratrix of the estate of Edward J. Wetzel (see Letters of Authority—Exhibit A for the motion) be substituted in the place and stead of Edward J. Wetzel in the above-entitled cause for reasons which appear in the memorandum in support of this motion.

JACK G. DAY,
1748 Standard Building,
Cleveland 13, Ohio,

FRANCIS M. MARLEY,
Room 4, Rosendale Building,
Fostoria, Ohio,

*Counsel for Appellant.*

June 14, 1962.

## MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE.

Appellant Edward J. Wetzel died on April 26, 1962. His wife, Mrs. Margie Wetzel was appointed administratrix of his estate on June 6, 1962. (See Letters of Authority—Exhibit A for the motion.)

The motion to substitute the administratrix for the Appellant should be granted for the following reasons:

1. The deceased and his family have a substantial interest in clearing his name.

2. The estate of the deceased is liable for costs in the trial court in the amount of $469.20 with interest from May 25, 1960. (See Tr. I, Execution for Costs in Felony).* The appellate costs are also due by virtue of a judgment in the Supreme Court of Ohio (Tr. I, Judgment of the Supreme Court of Ohio, dated January 24, 1962).

3. The questions in issue are of great public interest because:

a. The application and administration of Ohio Revised Code Section 2905.34 and the exemptions to that section involve strictures on the rights of citizens and residents of Ohio contrary to the First and Fourteenth Amendments to the Constitution of the United States.

b. The application of the exclusionary rule established by *Mapp v. Ohio*, 367 U. S. 643 (1961)

* "Tr. I" refers to the bound documents without page numbers filed with the Clerk of the Supreme Court of the United States by Clerk of Courts, Wyandot County, Ohio, as part of the record in this case.

was denied for failure to raise the issue of illegal search and seizure before the exclusionary rule was announced as constitutional doctrine, thus depriving the deceased of a federal right guaranteed him by the Fourth and Fourteenth Amendments to the Constitution of the United States and impeding the administration of justice by conditioning rights on a futile act.

c. The conflict of Ohio Revised Code Section 2905.34 with the First and Fourteenth Amendments is an issue which will be raised again and again. In the past two years questions involving the constitutionality of this section have been brought to this Court in *Mapp v. Ohio*, *id.*, raising constitutional issues substantially similar to those in the present case and *Ohio v. Jacobellis* (Jurisdictional Statement due June 14, 1962), involving a different factual situation but putting in question the statute's constitutionality in the light of the First and Fourteenth Amendments.

Three challenges, including the instant one, are only the beginning. The statute will be repeatedly assailed until this Court puts to rest the constitutional concerns which surround it.

Respectfully submitted,

JACK G. DAY,
FRANCIS M. MARLEY,
*Counsel for Appellant.*

## EXHIBIT A.

### LETTERS OF AUTHORITY

No. 13212.

The State of Ohio, Wyandot County, ss:

*To All to Whom These Presents May Come, Greeting:*

Know Ye, That the Honorable, the Judge of the Court of Common Pleas, Probate Division of the County of Wyandot and State of Ohio, has appointed and by these presents does appoint Margie Wetzel, Administratrix of the estate of Edward J. Wetzel, deceased, late of Carey, Ohio, hereby granting to said Margie Wetzel, Administratrix all and singular the power necessary and by law required, to enable her fully to do, act and perform all and singular the duties of Administratrix for said estate according to law.

In Testimony Whereof, I have hereunto affixed my signature and the seal of said Court at Upper Sandusky, Ohio, this 6th day of June, 1962.

RUSSELL H. KEAR,
*Judge.*

(Seal)

# In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. .....

EDWARD J. WETZEL,

*Appellant,*

vs.

THE STATE OF OHIO,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF OHIO.

## JURISDICTIONAL STATEMENT.

Appellant appeals from the Judgment of the Supreme Court of Ohio, entered on January 17, 1962, setting aside a judgment of the Court of Appeals for Wyandot County, Ohio, and affirming the judgment of conviction in the trial court, the Court of Common Pleas, Wyandot County, Ohio, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## OPINION BELOW.

The opinion of the Supreme Court of Ohio is reported at 173 Ohio St. 16. (Tr. II, 70)[1] The opinion of the

[1] The record as filed by the Clerk of the Court of Common Pleas of Wyandot County, Ohio, consisted of seven items not bound together. Where the pages of that part of the record are numbered at all, the numbering is within the particular item, for example the *Bill of Exceptions* is numbered by pages 1-141

*(Continued on following page)*

Court of Appeals for Wyandot County, Ohio, is not yet reported. A copy of the opinion in the Court of Appeals is attached hereto as Appendix A. The trial court wrote no opinion.

## JURISDICTION.

This case began as a criminal prosecution under Section 2905.34 of the Revised Code of Ohio in the Court of Common Pleas of Wyandot County, Ohio, resulting in a verdict of guilty on the 25th day of May, 1960, upon which judgment was entered assessing costs against the defendant and sentencing him to an indeterminate sentence of from one to seven years in the Ohio Penitentiary (see Journal Entry sentencing Appellant, Tr. I). The Court of Appeals, Wyandot County, Ohio, reversed but certified the cause to the Supreme Court of Ohio for conflict with *Ohio v. Mapp*, 170 Ohio St. 427 (1960).

The latter case had been affirmed without opinion by the Court of Appeals for Cuyahoga County, Ohio, and affirmed again in the Supreme Court of Ohio for want of a six to one plurality. A majority thought the statute (RC 2905.34), upon which the conviction was based, unconstitutional. But Section 2 of Article IV of the Constitution of Ohio, quoted in pertinent part in *Ohio v. Mapp*, id., 434 prevented reversal. In the present case the Supreme

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*(Continued from preceding page)*

and the *Transcript and Original Pleadings* are in a binder but not numbered. Also submitted as part of the record is the *Certified Transcript of Record* (Case No. 36945) from the Supreme Court of Ohio, which is paginated.

Throughout this Motion and Jurisdictional Statement references to the *Transcript and Original Pleadings* shall be by description of the particular document and "Tr. I." References to *Certified Transcript of Record* shall be identified by "Tr. II" with the proper page indication. Reference to the *Bill of Exceptions*, which contains the verbatim testimony, will be by the designation "R" followed by a page designation.

Court of Ohio reversed the Court of Appeals for Wyandot County, Ohio, and affirmed the Court of Common Pleas for that County on January 17, 1962. Notice of Appeal was filed in the Supreme Court of Ohio and in the Court of Common Pleas for Wyandot County, Ohio, the latter court being possessed of the record, on April 16, 1962.

The jurisdiction of the Supreme Court to review this judgment is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Mapp v. Ohio*, 367 U. S. 643 (1961); *Smith v. California*, 361 U. S. 147 (1959); *Butler v. Michigan*, 352 U. S. 380 (1957).

## STATUTES INVOLVED.

Ohio Revised Code Sections 2905.34, 2905.37, and 3767.01 are set out in attached Appendix B.

## QUESTIONS PRESENTED.

The following questions are presented by this appeal:

(1) Whether Appellant's conviction under Ohio RC 2905.34 for mere possession or control, without knowledge, of pornographic materials is contrary to the First and Fourteenth Amendments to the United States Constitution?

(2) Whether Appellant's conviction under Ohio RC 2905.34 for mere possession or control, with knowledge, of pornographic materials is contrary to the First and Fourteenth Amendments to the United States Constitution?

(3) Whether Appellant's conviction under Ohio RC 2905.34 for constructive possession or control of pornographic materials is a conviction for violation of a standard of conduct so vague, uncertain and indefinite as to contravene the due process clause of the

Fourteenth Amendment to the United States Constitution?

(4) Whether the conclusions of the Supreme Court of Ohio, that the quantity of pornographic materials seized indicated Appellant's knowledge of such materials and *his intent to sell them*, are warranted from the evidence in the record and saves the statute (Ohio RC 2905.34) under which Appellant was convicted from contravention of the First and Fourteenth Amendments to the United States Constitution?

(5) Whether exemptions from Ohio RC 2905.34 contained in Ohio RC 2905.37 and 3767.01 provide classifications (a) based on distinctions so insubstantial and so unrelated to statutory objectives or (b) so arbitrary and unreasonable as to render Appellant's conviction contrary to the equal protection clause in the Fourteenth Amendment to the United States Constitution?

(6) Whether the admission of the product of an illegal search and seizure at the Appellant's trial was contrary to the Fourth and Fourteenth Amendments to the United States Constitution and invalidated Appellant's conviction?

(7) Whether the issue concerning the admission of the product of the illegal search and seizure was raised in timely fashion by objection at the trial [before *Mapp v. Ohio*, 367 U. S. 643 (1961) ] and on Motion for Rehearing in the Supreme Court of Ohio after *Mapp v. Ohio, supra*?

(8) Whether the Supreme Court of Ohio's interpretation of the evidence in the record is justified when it concludes that the *quantity* of pornographic materials seized, *without more*, indicates Appellant's knowledge of, and intent to sell, such materials and does such attempted justification save the statute from contravention of the First and Fourteenth Amendments to the United States Constitution?

## STATEMENT OF CASE.

Appellant used a four wheel trailer in his business as a salesman for porcelain tubs and suds savers (R. 61-62, 112). However, before his indictment and trial in the instant case, he had discontinued business because of a totally disabling heart condition (R. 112-113).

In the late summer (R. 122) or fall of 1958 (R. 111-112, 113) he stored his trailer on a farm belonging to his mother-in-law. This was done after he had experienced some trouble in selling it (R. 112).

At this time Appellant had known one Overmeyer for about twenty-five years (R. 117, 123). Overmeyer had been in the sporting goods business in Fremont, Ohio, for twenty to twenty-five years and Appellant had bought his hunting and fishing licenses from him and had guns repaired and keys made at his shop (R. 117).

Overmeyer leased the trailer with an option to purchase it from Appellant sometime before he (Overmeyer) went to the Ohio Penitentiary (R. 117, 124). But Appellant had no knowledge of what was stored in it (R. 123). Such large quantities of allegedly obscene materials had been seized from Overmeyer (R. 126) when he was arrested that Appellant thought him "clean with me" (i.e. Wetzel) (R. 126) and had no reason to believe Overmeyer would store obscene materials in the trailer.

From conversations with Overmeyer, Appellant thought holsters and other inventory of the sporting goods business were going to be stored in the trailer (R. 126). He did not know the materials claimed to be obscene were going to be placed there or that they were there (R. 119). Materials found in the trailer indicated Overmeyer's connection and possibly the relationship of other persons to the items stored there (R. 53-54, 104-105) (Defendant's Exhibit 1 admitted at R. 127). Appellant himself placed

nothing there after it was parked on the farm (R. 114). And on the occasions he visited the farm, either to check the trailer's condition (R. 114, 125) or, as in one instance, to show it to a prospective purchaser (R. 124-125), he had never examined the contents (R. 116). The trailer had built-up plywood sides, a canvas top, and was arranged in back to lock (R. 5-6, 114) and it was impossible to see the contents until the trailer was opened (R. 53). The materials inside were packaged and not yisible without removing the covering (R. 7, 46). Appellant's property in the trailer consisted of a jack, hammer, and a tire wrench (R. 114).

The trailer remained at the farm where it had been placed and Appellant noticed on one visit that chains were on the trailer (R. 122) and that it was chained to the barn (R. 7, 93). Appellant did not put on the chains (R. 114-115, 122). Overmeyer had given Appellant the keys to the locks affixed to the chains (R. 116-117, 122) in case Appellant might need to move the trailer while Overmeyer was away serving his sentence (R. 117, 124). Appellant knew something was in the trailer from the presence of the locks (R. 116) but the nature of the contents were unknown to him (R. 116) until seized by the Sheriff (R. 116, 118, 123, 127).

The Sheriff of Wyandot County cut the chains to get into the trailer (R. 7, 9), searched the trailer and seized the contents (R. 7, 10-46). All of this was initiated on a tip from the Chief of Police of Cleveland, Ohio (R. 3-4). There was no warrant (R. 56). The admission of the product of the search was the subject of an overruled objection (R. 109-110).

The purported obscenity was not discovered until

after the trailer was broken into and after the packages were broken open (R. 7).

There was no evidence affirmatively indicating that Appellant placed the seized materials in the trailer, knew they were there, or that he ever removed or sold any of them. The only evidence on these issues were Appellant's denials (R. 116, 118, 123, and 126) and the testimony of one witness that he once saw the Appellant carrying a shoebox out of the barn but did not know its contents or where Appellant got it (R. 90-91). Nevertheless, the opinion of the Supreme Court of Ohio summarizes testimony purporting to illustrate Appellant's admission that he occasionally sold material contained in the trailer, 173 Ohio St. 16, 18 (Tr. II, 72). From the opinion it clearly appears that the Supreme Court of Ohio thought the evidence showed that the material sold was allegedly obscene matter. This is the result of a misreading of the record by the Court. The context supports no such inference. The exact colloquy was:

> "If I recall it correctly, he told me he was in business in Lima, and due to his heart condition he had had to quit his business and that some of the things he had not been able to sell, he had just stored in this trailer —was the only place he had to put it. And, occasionally, if he had somebody who wanted some of it, he would sell it." (R. 96.)

The record is absolutely barren of evidence of any business carried on by Appellant except the assembling of tubs and suds savers (R. 61-62, 112). One witness thought, from conversations with Appellant, that the business had "something to do with plumbing" (R. 99-100) and that he had carried "merchandise" in the trailer when he had been business (R. 100).

The Federal questions for which review is sought were initially raised in the following manner:[2]

(1), (2) and (3). Mere possession and/or mere constructive possession of pornographic materials with or without knowledge was raised by motions for directed verdict at the end of the state's case (R. 110) and at the end of the whole case (R. 127-128), by objection to the admission of the state's exhibits of the alleged pornographic materials (R. 109-110), by motion for a new trial (Tr. I) and assignments of error in the Court of Appeals (see Assignments 1, 3, 5, 6, and 7 in Appendix A attached). Mere possession with knowledge was raised also on motion to quash (see Tr. I). The trial court denied the motion to quash (Journal Entry of May 2, 1960, Tr. I), denied both motions for directed verdict (R. 110, 127-128), admitted the State's exhibits over objections to all but three (R. 109-110), and denied the Appellant's motion for a new trial (Tr. I). These three issues were raised again in the Supreme Court of Ohio (Tr. II, 49-52, 60-61, 79-83). Accordingly, these three questions and therefore this appeal as to them involves a state court decision which sustained the validity of a statute against the Appellant's objections based on federal constitutional grounds.

(4) and (8). The Supreme Court of Ohio in its opinion in this case at 173 Ohio St. 16, 18 (Tr. II, 72) summarizes testimony purporting to show Appellant's admission that he sold "material contained in the trailer" but the testimony does not support admissions of the sale of material of a pornographic nature (R. 96). At page 19 of

[2] The numbering used for the federal questions presented above will be followed here with only sufficient repetition to relate the questions to the manner and method of raising them and their disposition as required by the *Rules of the Supreme Court of the United States*, 15(2)(d).

the opinion the court (Tr. II, 73), finds a warrantable deduction of possession with knowledge and intent to sell from the quantity of material.

Thus, these two questions, and therefore this appeal as to them, involves a state court decision reading into a state statute qualifications which are not explicitly there in order to sustain the statute against Appellant's objections based on federal constitutional grounds. In addition, the application of such qualifications to this Appellant are not supported by the evidence.

(5) The question of discriminatory exemptions to the statute under which Appellant was convicted in violation of the equal protection clause was raised in Appellant's Supplemental Brief in the Court of Appeals (see unbound record filed in this Court by the Clerk of Common Pleas Court, Wyandot County, Ohio), and in the Appellant's answer brief in the Supreme Court of Ohio (Tr. II, 61-64, 67). It may fairly be said also to be encompassed in Appellant's motion to quash the instant indictment (Tr. I) which challenged the constitutionality of the statute under Articles I and XIV of the Amendments to the Constitution of the United States. The motion was overruled. (Journal Entry of May 2, 1960; Tr. I).

This appeal involves a state court decision which omitted reference to a constitutional attack on a state statute. Thus it must be assumed that the state either ignored the constitutional objection or decided it adversely. In either case the statute was sustained against Appellant's objection based on federal constitutional grounds.

(6) and (7). The product of the search without a warrant (R. 56) was admitted over the Appellant's objection (R. 109-110). *Mapp v. Ohio*, 367 U. S. 643 (June 19, 1961) had not been decided. When that case came

down, the brief of Appellant in the instant case had already been filed in the Supreme Court of Ohio (April 6, 1961, Tr. II, 42). The issue was apparently considered in the majority opinion in the Supreme Court of Ohio but the majority brushed it aside as inopportunely raised, 173 Ohio St. 16, 20 (Tr. II, 74). Upon timely application for rehearing the objection to the admissibility of the product of the search without a warrant was raised (Tr. II, 78-79). The Supreme Court of Ohio denied the application on February 7, 1962, (Tr. II, 10) without assigning reasons (Tr. II, 11).

Thus, assuming the anterior question (whether the issue was raised in timely fashion) is answered affirmatively in this court; the basic issue of the admissibility of the product of a claimed illegal search involves a state court decision which sustained a conviction against Appellant's objection based on federal constitutional grounds. There is the further federal question whether the issue of timeliness is for the state courts or the federal courts in enforcing a right guaranteed by the Constitution of the United States against state invasion.

## THE QUESTIONS ARE SUBSTANTIAL.

1.[3] The due process clause of the Fourteenth Amendment to the United States Constitution is offended by the state statute involved here in at least two important particulars. Mere possession of pornography, mere possession with knowledge, or constructive possession of such materials with or without knowledge have some constitutional infirmities in common.

To the degree that a statute makes possession of pornography (literal or constructive) criminal without knowledge, it must fall as contrary to the rule in *Smith v. California, supra.* This follows even though "obscene speech and writings" have been held to be outside the "constitutional guarantees of freedom of speech and the press" because to impose criminality under such circumstances may have the constitutionally offensive consequence of limiting disseminations which are not obscene. *A fortiori* dissemination should enjoy no greater protection than mere possession.

Appellant passes for the moment the question whether the statute can be saved by the reading given it by the Supreme Court of Ohio to include intent to sell and scienter, the former a necessary ingredient to avoid the unconstitutional aspects of an invasion of privacy and the latter to meet the due process requirements imposed by *Smith v. California, supra.* And passes also, for now, whether the record will support the interpolations of intent and scienter as to this Appellant.

The imposition of criminality for mere possession (literal or constructive), with knowledge, has a restrictive effect less defensible than that in *Smith v. California,*

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[3] "Questions presented" Nos. 1 and 2 are discussed in this section.

*supra*. Restricting the bookseller in the manner proposed there jeopardized the public's non-private access to reading matter. To restrict mere possession with knowledge, as here, tends to restrict access to the printed work to individual members of the public even in private. "* * * a State is not free to adopt whatever procedures it pleases for dealing with obscenity * * * without regard to the possible consequences for constitutionally protected speech," *Marcus v. Search Warrant*, 367 U. S. 717, 731 (1961). The subtlety of the interference with a first amendment right will not save it. Cf. *Bates v. Little Rock*, 361 U. S. 516, 523 (1960); *NAACP v. Alabama*, 357 U. S. 449, 462 (1958). Group privacy is no more indispensable to freedom of association, *NAACP v. Alabama, id.*, than individual privacy is to freedom of inquiry. The question of weight under such circumstances is the right to read, *Butler v. Michigan, supra*, or, in this case, the right to look. That the examination is private augments the reasons for its protection, for the individual's *personal control of his own mind is at stake*.

In short, perhaps the most important issue here is whether a person may possess and examine in private any printed or pictorial matter he pleases, regardless of its nature, without let or hindrance from the state even under a statute interpreted to require intent to sell and scienter.

If a statute, as in the instant case, says to the contrary, does it square with the protection guaranteed individual rights by the First and Fourteenth Amendments?

In testing the answer to this question, the Appellant is entitled to the benefit of the presumption in favor of rights guaranteed by the First Amendment. *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153 n. 4 (1938); *Schneider v. State*, 308 U. S. 147, 161 (1939); *Thomas v. Collins*, 323 U. S. 516, 530 (1945).

2.[4] The total record here respecting possession was made on the Appellant's testimony. The substance of this was that Appellant owned the trailer containing seized materials but had leased it with an option to purchase to one Overmeyer. When the latter was about to enter the penitentiary to serve a sentence, he gave the Appellant keys to the locks fastening the trailer to the barn in the event Appellant should have to move the trailer while he (Overmeyer) was gone.

Assuming *arguendo* that the statute, explicitly or by clear implication, condemns mere possession with knowledge or mere possession with knowledge with intent to sell, it is not specific on the question of constructive possession. Nor does the language of the enactment support any implication that constructive possession meets the statutory standard. Its infirmity in this particular is that it provides no clear guide, instruction, or definition of what is forbidden and thus gives no warning. *United States v. Cohen Grocery Co.*, 255 U. S. 81, 89 (1921); *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221-223 (1914); *Herndon v. Lowry*, 301 U. S. 242, 261-264 (1937); *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939); *Musser v. Utah*, 333 U. S. 95, 97 (1948); *Raley v. Ohio*, 360 U. S. 423, 438 (1959). Moreover, the breadth of a criminal enactment may be its fatal defect. *Lovell v. Griffen*, 303 U. S. 444, 451 (1938); *Schneider v. State, supra*, 162-164 (1939); *Hague v. C. I. O.*, 307 U. S. 496, 516 (1939); *Thornhill v. Alabama*, 310 U. S. 88, 97-98 (1940); *Carlson v. California*, 310 U. S. 106, 112 (1940); *Cantwell v. Connecticut*, 310 U. S. 296, 307-308 (1940). The application in the present case broadened the statute's terms to include constructive possession.

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[4] "Question presented" No. 3 is discussed in this section.

3.[5] The Supreme Court of Ohio construed the statute (RC 2905.34) to include both intent to sell and scienter, and as thus construed, applied it in this case, 173 Ohio St. 16, 19. Ordinarily where the sole basis of decision is the construction given a state statute by the highest court of that state, it is binding upon the Supreme Court of the United States, *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509 (1933), but it is the practical operation of the statute and not its label which counts, *Interstate Pipe Line Co. v. Stone*, 337 U. S. 662, 666 (1949). Assuming, without conceding, that the construction placed upon the statute by the Ohio Supreme Court preserves it against constitutional attack, still the statute was applied unconstitutionally to this defendant.

This court will generally not review a state court's finding of fact if it has some factual foundation, *cf. Fry Roofing Co. v. Wood*, 344 U. S. 157, 160 (1952), but there is no evidence in the record to support the appellant's knowledge of the presence of the materials proscribed by R. C. 2905.34. And no evidence in the record supports the purported admission by the appellant that he sold such materials. The intent to sell thus rests on an inference from the mere quantity of materials involved, 173 Ohio St. 16, 19. Under such circumstances where a federal right has been denied, the facts found by a state court will be reviewed, cf. *Fiske v. Kansas*, 274 U. S. 380, 385 (1927). And due process is violated if the state convicts and punishes without evidence of guilt, *Thompson v. Louisville*, 362 U. S. 199, 206 (1960).

An independent examination of facts will be made also where a state court's conclusions respecting a federal right are so commingled with findings of fact that it becomes

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[5] "Questions presented" Nos. 4 and 8 are discussed in this section.

necessary to analyze the facts in order to assess the federal question, *Fiske v. Kansas, supra; Norris v. Alabama*, 294 U. S. 587, 590 (1935); *Chambers v. Florida*, 309 U. S. 227, 228-229 (1940); *Ashcraft v. Tennessee*, 322 U. S. 143, 147-148 (1944); *Craig v. Harney*, 331 U. S. 367, 373-374 (1947). And determinations of legal questions dependent upon the competency, legal effect or sufficiency of the evidence found in a state court are for this court. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 241-246 (1897); *Graham v. Gill*, 223 U. S. 643, 644-645 (1912); *Speiser v. Randall*, 357 U. S. 513, 519-521 (1958); *Elkins v. United States*, 364 U. S. 206, 223-224 (1960); *Thompson v. Louisville, supra*, 206; *Columbe v. Connecticut*, 367 U. S. 568, 603-606, 606 *et seq.* (1961); *Reck v. Pate*, 367 U. S. 433 (1961); *Irvin v. Dowd*, 366 U. S. 717 (1960).

Here analysis of the facts will determine that the Appellant did not possess the requisite intent and knowledge to bring him within the statute as construed by Ohio's highest court, that lacking scienter in fact he fell within the rule of *Smith v. California, supra*. Moreover, the lack of intent to sell kept the public aspects out and his right of private looking and reading intact with all the constitutional consequences the latter right entails, see *Butler v. Michigan, supra*; cf. *NAACP v. Alabama, supra*.

4.[6] The exemptions in issue appear in Ohio RC 2905.37 and 3767.01 (see Appendix B attached). Druggists and non-profit art associations, among others, under Section 2905.37, and holders of class mail permits under Section 3767.01, are exempted from 2905.34. Thus such exemptees are permitted to do exactly what appellant may not do without incurring criminal penalties. There can

[6] "Question presented" No. 5 is discussed under this section.

only be arbitrary and discriminatory foundations for classifications which distinguish between sales by druggists, dissemination by non-profit art associations and particular mail permit holders, and knowledgeable dissemination by one situated as was the appellant (assuming, again *arguendo*, that he had possession, knowledge and intent). Statutes applied by public authority with an "unequal hand" offend the equal protection clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U. S. 356, 373-374 (1886); cf. *Pierce v. Society of Sisters*, 268 U. S. 510, 534-535 (1925).

5.[7] The Sheriff of Wyandot County acted on a tip from the Cleveland Chief of Police in making the search and seizure in the present case. He acted without a warrant. He did not discover the nature of the material seized until after the search had begun.

Under such circumstances were there reasonable grounds for believing a crime had been committed sufficient to meet the requirement of probable cause? *Carroll v. United States*, 267 U. S. 132, 149 (1925); *Brinegar v. United States*, 338 U. S. 160, 175 (1949); Simple belief, *Nathanson v. United States*, 290 U. S. 41, 46-47 (1933) and good faith, *Henry v. United States*, 361 U. S. 98, 102 (1959) are not enough. That faith must be grounded on facts known to the officer which make the faith reasonable, *Director General v. Kastenbaum*, 263 U. S. 25, 28 (1923). Here the circumstances were *not* such that an officer was justified in making the judgment on probable cause, cf. *Hester v. United States*, 265 U. S. 57 (1924); *Brinegar v. United States, supra; Carroll v. United States, supra; United States v. Rabinowitz*, 339 U. S. 56 (1950);

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[7] "Questions presented" Nos. 6 and 7 are discussed under this section.

that decision should have been referred to a magistrate, *McDonald v. United States*, 335 U. S. 451, 454-456 (1948); *Johnson v. United States*, 333 U. S. 10, 13-14 (1947); *Trupiano v. United States*, 334 U. S. 699, 709-710 (1948); *Chapman v. United States*, 365 U. S. 610, 613-614 (1961). See especially *Taylor v. United States*, 286 U. S. 1 (1932).

There was sufficient time under the circumstances of the present case to secure a warrant. There was no reason justifying a failure to get it. Failure to do so should invalidate the search and seizure. Cf. *Trupiano v. United States, supra*, with *United States v. Rabinowitz, supra*, and see *Chapman v. United States, supra*.

The product of an illegal search and seizure is inadmissible in any State or United States Court as a matter of constitutional prohibition. A conviction based on such evidence is contrary to the Fourth and Fourteenth Amendments and will be overturned. *Mapp v. Ohio*, 367 U. S. 643 (1961).

The *Mapp* case, *id.*, did not settle the constitutionality of the exclusionary rule until after the present case was in the Supreme Court of Ohio. The issue was considered in the opinion of the Supreme Court of Ohio, 173 Ohio St. 16, 20 (Tr. II, 74) and raised specifically by application for reconsideration in the latter court. That application was denied (Tr. II, 78-79, 11).

The Supreme Court of Ohio decided it was not confronted here with an illegal search and seizure. The assigned rationale was that, while the Appellant had objected to the introduction of the seized materials at the trial, he had not done so because of the illegality of their acquisition, 173 Ohio St. 16, 20 (Tr. II, 74). This conclusion ignores the fact that the doctrine of exclusion was not available to Appellant until after his case was in the Supreme Court of Ohio. However, the posture of these

facts may bring the instant case within that line of decisions which raise an irrebuttable presumption that the federal question was timely and properly raised when the highest state court assumes a federal question is before it and decides it. *Whitney v. California*, 274 U. S. 357, 360-361 (1927); See also *Manhattan Life Ins. Co. v. Cohen*, 234 U. S. 123, 134 (1914). For the highest state court here decides the lack of timeliness upon an omission which was dictated by the lack of availability of the exclusionary rule at the time of the failure to invoke it. If this does not amount to "deciding" the issue so as to raise the presumption, then jurisdiction may attach because the state court action amounts to a "surprise" decision in that it requires objection on the basis of a proposition of law which was nonexistent. Appellant could not at trial time, or thereafter before his application for re-hearing, anticipate the *Mapp* rule nor that the Ohio Supreme Court would require what would have been futile (see 173 Ohio St. 16, 20; Tr. II, 74). This was a new and unanticipated procedural prerequisite which adversely affected Appellant's federal constitutional right. *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 677-678 (1930). Raising the issue on application for re-hearing was *at the first opportunity*, *Brinkerhoff-Faris Co. v. Hill, id.* Under such circumstances it is not dispositive that the application for rehearing was summarily denied without consideration of the federal issue, *Brinkerhoff-Faris Trust Co. v. Hill, id.*, 678; *Great Northern Ry. v. Sunburst Co.*, 287 U. S. 358, 366-367 (1932); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313, 320 (1930); *Saunders v. Shaw*, 244 U. S. 317, 320 (1917); *Cole v. Arkansas*, 333 U. S. 196, 200 (1948); cf. *American Surety Co. v. Baldwin*, 287 U. S. 156, 162-164 (1932); *Wilson v. Cook*, 327 U. S. 474, 485, n. (1946); *Herndon v. Georgia*, 295 U. S. 441 (1935).

Appellant suggests further that the refusal of the Supreme Court of Ohio to deal with the exclusionary question after *Mapp v. Ohio, supra*, is mere evasion and that this court can with propriety assert jurisdiction. Cf. *Rogers v. Alabama*, 192 U. S. 226, 230-231 (1904).

It is apparently the federal rule that the latest propositions of law formulated by this court ought to be applied, where relevant, to all cases coming before lower courts regardless of trial dates. *United States v. O'Conner* (2nd Cir. 1956), 237 F. 2d 466, 471; see also *Ladner v. United States*, 358 U. S. 169 (1958); *Heflin v. United States*, 358 U. S. 415, 416-417 (1959); *Thompson v. United States*, (2nd Cir. 1958) 261 F. 2d 809. There is no reason why the same principle should not apply to state actions affecting rights vouchsafed by the Fourteenth Amendment. See *Commonwealth v. Spofford*, 30 U. S. L. Week 2455 (1962) where it is pointed out that this court did just that in applying the principle of *Griffen v. Illinois*, 351 U. S. 12 (1956) to reverse a 1935 state conviction in *Eskridge v. Washington Prison Board*, 357 U. S. 214, 216 (1958).

## CONCLUSION.

The decision of the Supreme Court of Ohio has interpreted and applied statutes of the State of Ohio contrary to the First and Fourteenth Amendments to the Constitution of the United States. In so doing the Court has deprived Appellant of rights guaranteed by those amendments against state encroachment. Furthermore, in interpreting the Fourth and Fourteenth Amendments to the United States Constitution, the Supreme Court of Ohio has deprived Appellant of substantial federal rights vouchsafed him by the due process clause of the Fourteenth Amendment.

The questions presented by this appeal are substantial and are of public importance.

Respectfully submitted,

JACK G. DAY,
1748 Standard Building,
Cleveland 13, Ohio,

FRANCIS M. MARLEY,
Room 4, Rosendale Building,
Fostoria, Ohio,
*Counsel for Appellant.*

## APPENDIX A.

### Opinion of the Court of Appeals of the Third Appellate District, Wyandot County.

PER CURIAM

This is an appeal on questions of law from a judgment of conviction and sentence of the Court of Common Pleas of Wyandot County, Ohio, the defendant having been charged and convicted under the provisions of R. C. Sec. 2905.34.

The indictment upon which the conviction was based, omitting formal allegations, charged that the defendant "did unlawfully and knowingly have in his possession and under his control, obscene, lewd and lascivious picture photographs, pamphlets and other articles all of an indecent and immoral nature and all of which are too obscene for further description within the limits of decency" etc. The defendant moved that the indictment be quashed as not charging an offense, and for the reason that Section 2905.34 of the Revised Code violates the provisions of Article I and Article XIV of the Amendments to the Constitution of the United States. The trial court overruled this motion.

On the trial of the indictment evidence was introduced establishing that the defendant was the owner of a four wheeled van-type automobile trailer which he stored in a barn located on a farm owned by his mother-in-law, the home on the farm being occupied by tenants of his mother-in-law. These tenants testified that during a period of over a year the defendant came to the farm and went to the trailer on a number of different occasions, that in each case, except one, he was unaccompanied; that on the one occasion he was accompanied by a woman who drove her own car. The tenants further testified that when the trailer

was first brought to the farm it was not equipped with any chains or padlocks but that after one of defendant's visits to the trailer the tenants noticed that chains and padlocks had been applied to the trailer in such manner that the canvas top and tailgate could not be opened and in a way which held the trailer affixed to a beam of the barn. The tenants had no knowledge of the contents of the trailer although one of them testified that he had seen the defendant walk from the vicinity of the trailer to his car carrying a brown package of the size and shape of a shoe box. The Sheriff of Wyandot County testified to the effect that he had, following the receipt of a telephone call from the Chief of Police of the City of Cleveland, proceeded to the barn in question, cut through the chains on the trailer, and had taken therefrom a number of packages, each consisting of a brown paper sack with its contents, the packages being of various sizes, and each weighing from approximately five to approximately eight pounds. The Sheriff also found in the trailer an envelope with defendant's name and former business address printed in the usual manner on the upper left hand corner thereof, which envelope contained a number of film negatives. There were also six pieces of cardboard cut from a larger piece of cardboard, which when fitted together referred to an Izaak Walton Club, and a sheet upon which was printed four business cards of a sporting goods store located in Fremont, Ohio, operated by a Mr. Overmyer. Upon examination of the brown packages the Sheriff found them to contain in excess of 19,000 pieces of pamphlet literature and numerous photographs (mostly collected together in the form of decks of cards). Upon the arrest of the defendant by the Sheriff there were found upon the defendant keys which operated the padlocks removed from the trailer. The defendant called only one witness at the trial,

a physician who had been treating him for a period of years for a heart ailment, who testified to the effect that the defendant would suffer pain if he were to attempt to load all of the packages on the trailer at any one time, although he could possibly load several at a time without pain provided that he rested between exertions. The defendant testified to the effect that he had had no personal knowledge of the contents of the trailer, that he believed that the contents had been placed there by Mr. Overmyer, that the chains and padlocks had been placed there by Mr. Overmyer after which Overmyer gave the defendant the keys to the padlocks in case the defendant needed to move the trailer, that Overmyer had leased the trailer from the defendant with an option to buy the same, and that defendant believed that Overmyer had stored therein holsters and like items from the stock of his sporting goods store. There was no evidence that Mr. Overmyer had ever visited the trailer or the farm at which it was stored.

All of the literature and photographs taken from the trailer were introduced into and received in evidence, and the jury upon consideration thereof and the testimony of the witnesses found the defendant "guilty of possession and control of obscene literature, in manner and form as he stands charged in the indictment".

The defendant assigns error in the following particulars:

> "1. The Court of Common Pleas erred in overruling the motion to quash the indictment, in overruling the motion for a directed verdict made at the close of the state's case and renewed at the close of the entire case and in overruling the motion for new trial on the ground that the statute, R. C. 2905.34, under which defendant-appellant was charged, tried and convicted was unconstitutional, when such statute violates both

the federal and state constitutions and is thereby unconstitutional.

"2. The Court of Common Pleas erred in sustaining an objection to a question to the sheriff of Wyandot County as to his possession of the alleged obscene material, R. C. 2905.35 not having been complied with.

"3. That the Court of Common Pleas erred in refusing to direct the verdict in favor of defendant-appellant at the close of the state's case and in refusing to direct the verdict in favor of defendant-appellant at the close of all the evidence.

"4. That the Court of Common Pleas erred in refusing to give Requested Charges No. 1 and 3 to the jury before argument.

"5. That the Court of Common Pleas erred in admitting evidence over the objection of defendant-appellant.

"6. That the Court of Common Pleas erred in refusing to grant the motion for new trial.

"7. That the verdict and judgment in the court below were against the manifest weight of the evidence.

"8. That the verdict and judgment in the Court below were contrary to law."

This Court has carefully considered the Bill of Exceptions, the Exhibits, the Briefs and oral arguments of counsel, and, except for such bearing thereon as the constitutionality of the statute in question may have, finds that each and all of said assignments of error are without merit. However, since the conviction is based on a statute claimed to be unconstitutional under the provisions of both the federal and state constitutions we shall proceed to determine such constitutionality.

The Fourteenth Amendment to the Constitution of the United States has made the First Amendment of said Constitution prohibiting abridgment of the freedom of the press applicable to state as well as to federal government. *Near v. State of Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 626, 75 L. Ed. 1357.

Article I, Section 11 of the Constitution of Ohio provides that "no law shall be passed to restrain or abridge the liberty of speech, or of the press."

Revised Code Sec. 2905.34, upon which the indictment and conviction were based, provides in pertinent part as follows:

> "No person shall knowingly * * * have in his possession or under his control an obscene, lewd or lascivious book, magazine, pamphlet, paper, * * * print, picture, photograph, * * *.
>
> "Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both".

The portion of the statute above quoted has never been declared constitutional, nor unconstitutional, by either the Supreme Court of Ohio or the Supreme Court of the United States. In the case of *State vs. Mapp*, 170 Ohio State, 427, the constitutionality of said provisions was considered by the Supreme Court of Ohio on an appeal from the Court of Appeals of Cuyahoga County. The Court of Appeals of Cuyahoga County in case #24699 had, without opinion, on March 31, 1959, affirmed the conviction of the defendant. Since the Supreme Court considered the constitutionality of the statute it may be assumed that said issue was presented and argued in the courts below. See *State, ex rel. v. Shannon*, 170 Ohio St., 393, 394. However, the Supreme Court split in its decision, a ma-

jority of four members of the Supreme Court concluding that the quoted portion of the first paragraph of the statute was unconstitutional, and the remaining three members of the Court not joining in said conclusion. As the decision of the Court of Appeals of Cuyahoga County had not declared the law unconstitutional and void the Supreme Court could not, by reason of the provisions of Section 2 of Article IV of the Ohio Constitution, declare the same to be unconstitutional and void without the concurrence of six members of the Court. And, since a majority of the Court did not concur in finding said portion of the statute constitutional, the decision of the Supreme Court does not uphold the validity of the portion of the statute in question. It necessarily follows that the *Mapp* decision determines neither the constitutionality nor unconstitutionality of the statute under either the State or Federal Constitutions.

Moreover, as appears in the opinion of Judge Taft in the case of *State vs. Mapp, supra*, the Supreme Court of the United States had in the case of *Smith vs. California* (1959), 4 L. Ed. (2d), 205, 80 S. Ct., 215, held constitutionally invalid a Statute of California making the possession of obscene books unlawful but has never passed on the constitutionality of similar legislation involving *scienter*.

We conclude that since neither the Supreme Court of the United States or the Supreme Court of Ohio have passed upon the constitutionality of legislation such as that which we have under consideration, then there are no decisions in this respect binding upon this Court and we are free to reach our own conclusion. Nevertheless, we find the reasoning expressed by Justice Brennan in the *Smith* case as extended by Judge Taft in his opinion in the *Mapp* case cogent, compelling and inescapable, with par-

ticular reference to the following paragraphs on page 432, *et seq.*:

"In the court's opinion by Mr. Justice Brennan it is said:

> 'We have held that obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and the press. *Roth v. United States*, 354 U. S., 476, 1 L. Ed. (2d), 1498, 77 S. Ct., 1304. * * * our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold. * * * if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. * * * the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the state could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the state, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it,

the distribution of all books, both obscene and not obscene, would be impeded.'

"It may be argued that the legislation involved in the instant case, unlike that involved in the *Smith* case, requires *scienter* because it only makes it unlawful to '*knowingly* * * * have * * * possession.' However, this legislation is analogous in its effect to that in the *Smith* case. If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty of a serious crime, which may involve a sentence to the penitentiary similar to the one given to this defendant. As a result, one who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded. Cf. *Benjamin v. City of Columbus*, 167 Ohio St., 103, 146 N. E. (2d), 854, where no question of freedom of press involved." (*sic*)

Adopting this reasoning it is therefore the opinion and judgment of this Court that that portion of the first paragraph of R. C. Sec. 2905.34, hereinbefore quoted, is unconstitutional and void in its enactment both under the provisions of the First Amendment to the Constitution of the United States and of Article I, Section 11, of the Constitution of Ohio.

In arriving at this conclusion we are not unmindful of the character of the material admitted in evidence in this case as being unusually obscene, revolting and objectionable. We are likewise aware that there are other portions of the statute in question which are no doubt constitutional in their enactment and which, in appropriate cases, would be applicable to obtain the conviction of persons charged with more than the mere knowing possession of such material. We do not in any way condone the possession of the material herein by the defendant, but no matter how morally despicable such possession may be,

the defendant is still entitled to the protection of the Constitution of the United States and the Constitution of Ohio.

It is therefore the judgment of this Court that the judgment of conviction and sentence of the trial Court should be reversed and the defendant restored to his freedom. This judgment being in conflict with the judgment of the Court of Appeals of Cuyahoga County in the case of *State vs. Mapp*, which judgment as to the question of constitutionality stands neither reversed nor specifically affirmed, it is therefore the order of this Court that the same shall be certified to the Supreme Court of Ohio for review as provided by law.

YOUNGER, *P.J.*, GUERNSEY and MIDDLETON, *JJ.* concur.

## APPENDIX B.

### Statutes:

**§ 2905.34 Selling, exhibiting, and possessing obscene literature or drugs, for criminal purposes.** (GC § 13035)

*No person shall knowingly sell, lend, give away,* exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or

printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both.

**§ 2905.37 Legitimate publications not obscene.** (GC § 13037)

Sections 2905.33 to 2905.36, inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit.

**§ 3767.01 Definitions.** (GC § 6212-1)

As used in all sections of the Revised Code relating to nuisances:

(A) "Place" includes any building, erection, or place or any separate part or portion thereof or the ground itself;

(B) "Person" includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

(C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown; and the personal property and contents used in conducting and maintaining any such place for any such purpose. This section and sections 2905.34, 2905.35, 2905.37, and 2933.21 of the Revised Code shall not affect any motion picture film which has been approved by the division of film censorship or any newspaper, magazine, or other publication entered as second class matter by the post-office department.